



OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

November 18, 2002

Ms. Guadalupe Cuellar
Assistant City Attorney
City of El Paso
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901-1196

OR2002-6575

Dear Ms. Cuellar:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172303.

The City of El Paso (the "city") received a request for any correspondence from the Equal Employment Opportunity Commission (the "EEOC") regarding the police and fire departments since January 1, 1997. You state a portion of the responsive information will be released to the requestor. However, you claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.117, and 552.1175 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You have highlighted portions of the submitted information as excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A government body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the government body receives the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). This office has concluded that litigation was reasonably anticipated when a potential opposing party filed a complaint with the EEOC. Open Records Decision No. 336 (1982). You state that the information you have highlighted concerns complaints filed with the EEOC by city employees. Therefore, we agree that where complaints are pending with the EEOC, you have established that litigation was reasonably anticipated. You also state that in certain instances, the complainants have already filed suit against the city. After reviewing your arguments and the submitted information, we conclude that you have established that litigation was pending. We also find that the highlighted information is related to the anticipated and pending litigation for purposes of section 552.103(a).

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Upon review of the submitted information, we note that some of this information has either been obtained from or provided to the opposing party. Therefore, only the information we have marked may be withheld pursuant to section 552.103 of the Government Code. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Additionally, you have submitted complaints that have been dismissed by the EEOC in which litigation is not pending. You have not stated that these complainants have taken objective steps towards litigation. See Open Records Decision Nos. 555 (1990) (governmental body's receipt of letter containing specific threat to sue governmental body from attorney for potential opposing party), 518 (1989) (litigation must be "realistically contemplated"), 346 (1982) (hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly), and 288 (1981) (threatened to sue on several occasions and hired an attorney). Furthermore, receiving a letter from the EEOC notifying complainants of their right to sue does not indicate that these parties will automatically file suit against the city. Therefore, you have not established the applicability of section 552.103 in regard to this information and it may not be withheld.

You have also highlighted portions of the submitted information as excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common-law privacy. Information is protected under the common-law right to privacy when (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Having reviewed the submitted information, we conclude that the highlighted information concerns the employment of the individuals in question and, thus, is of legitimate concern to the public. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). Therefore, most of the information you have highlighted may not be withheld under section 552.101 of the Government Code in conjunction with the common-law right to privacy. We note, however, that some of the submitted documents relate to allegations of sexual harassment. Pursuant to *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the city must withhold the identities of the victims of sexual harassment. We have marked the information that must be withheld.

In regard to the remaining highlighted information, section 552.117 of the Government Code excepts from disclosure the home addresses, telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential in accordance with section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The city must withhold this type of information pursuant to section 552.117 only to the extent that the respective employee elected to keep this information confidential prior to the county's receipt of the current records request.

Additionally, section 552.117(2) of the Government Code excepts from disclosure "information that relates to the home address, home telephone number, or social security number" of a peace officer, or that reveals whether the peace officer has family members. Therefore, you must withhold this information under section 552.117(2) of the Government

Code regardless of whether that peace officer has made a section 552.024 election. As we are able to make this determination, we need not address your argument under section 552.1175 of the Government Code.

In summary, we conclude that: 1) you may withhold the information we have marked pursuant to section 552.103; 2) you must withhold the information we have marked as protected by common-law privacy under section 552.101; and 3) you must withhold the information we have marked under section 552.117 to the extent that the respective employee elected to keep this information confidential prior to the city's receipt of the current records request or under section 552.117(2) for the information of a peace officer. All remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 172303

Enc: Submitted documents

c: Ms. Louie Gilot
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(w/o enclosures)